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November 19, 2004

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Unbundled Access to Network Elements*, WC Docket No. 04-313;

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338;

Dear Ms. Dortch:

BellSouth Telecommunications, Inc. ("BellSouth") submits this response to a recent ex parte from the Association for Local Telecommunications Services ("ALTS") in which ALTS argues that the Commission's "impairment" test for high-capacity facilities should require the presence of alternative wholesale providers of those facilities.[1] By advocating the establishment of such a wholesale requirement, ALTS is inviting the Commission to violate the Telecommunications Act of 1996 ("1996 Act") and thereby lead to yet another judicial reversal – an invitation the Commission should respectfully decline.

A rule that required wholesale alternatives to a facility before the Commission found no impairment would be legally unsustainable. Under such a rule, consumers could have ample choices among facilities-based providers, but the Commission would still impose the significant social costs of unbundling because some individual competing local exchange carriers ("CLECs") might be unable to lease facilities from a third-party wholesaler. For instance, there could be five or even ten facilities-based alternative providers of high-capacity loops in a

[1] Ex Parte Letter from Jason Oxman, Counsel to ALTS, to Marlene Dortch, Secretary, FCC (November 8, 2004) ("*ALTS Ex Parte*"). ALTS also criticizes information in the UNE Fact Report and argues that intermodal competition is insufficient to making a finding of no impairment for high-capacity facilities because, according to ALTS, cable operators "do not serve the small/medium business market." *ALTS Ex Parte* at 1-4 & 6-7. ALTS's criticisms of the UNE Fact Report will be addressed in a separate filing, and BellSouth previously refuted ALTS's erroneous claims about the alleged lack of intermodal alternatives for business customers. *See* Ex Parte Letter from Jonathan Banks, BellSouth, to Marlene Dortch, Secretary, FCC (November 8, 2004) (noting the extensive competition from cable companies in the high-speed data market for business customers).

particular market, but the Commission would still find that "impairment" exists because those alternative providers have determined that it does not make business sense for them to act as wholesalers. Such a test is wholly contrary to the Supreme Court's and the D.C. Circuit's authoritative interpretations of the 1996 Act as well as this Commission's own holdings.

First, a Commission decision to look only at the existence of a wholesale market would directly contravene the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*.[2] There, the Court concluded that the Commission's adoption of an impairment test that did not consider the ability of competitors to "*self-provision, or* . . . purchas[e] facilities from another provider"[3] by itself "require[d] the Commission's rule to be set aside." A rule that required the existence of a wholesale market would simply ignore the ability of CLECs to "self-provision," contrary to the Court's express holding.

Although the Commission need go no further to conclude that such a rule would violate the Supreme Court's mandate, it is notable that, in *Iowa Utilities Board*, the Court explained that a lawful impairment inquiry could not permit the business decisions of "entrants" to "determine ... whether the failure to obtain access to nonproprietary elements would impair the ability to provide services."[4] Based on the Court's reasoning, allowing CLEC decisions regarding whether to act as wholesalers to determine impairment would be unlawful.

Second, and equally important, the D.C. Circuit, in effectuating the Supreme Court's decision, has made clear that the relevant question in determining whether a facility should be unbundled is whether *consumers* can receive the benefits of facilities-based competition without the social costs of unbundling, not whether individual *competitors* would have alternatives to the incumbent's facilities. This issue was squarely presented in *USTA I*.[5] There, the Commission defended its line-sharing requirement by arguing that, regardless of whether consumers had competitive choices, the statute required unbundling unless there was a wholesale market that gave wireline broadband competitors competitive options. The Commission was explicit on this point: "The alternative technologies identified by petitioners are no substitute for line sharing. Undoubtedly, those technologies allow some *consumers* to obtain broadband services through alternative means, including cable, wireless, and satellite systems. The operators of those

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[2] 525 U.S. 366 (1999).

[3] *Id.* at 389 (emphasis added).

[4] *Id.*

[5] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 56 (1999) ("*UNE Remand Order*"), *petitions for review granted, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

systems, however, are under no express statutory obligations to share their facilities with CLECs. Thus, those facilities are not available to *CLECs* that wish to offer DSL-based services."[6]

The D.C. Circuit rejected that argument as fundamentally inconsistent with the 1996 Act. The court explained that so long as consumers were obtaining the benefits of competition from facilities-based intermodal or intramodal alternatives, the Commission could not require unbundling on the ground that wireline CLECs had no alternatives to UNEs. The court stated that the Commission's contrary understanding of the statute was "quite unreasonable" and involved a "naked disregard of the competitive context."[7]

The court of appeals reiterated this same dispositive point in *USTA II*.[8] There, the court, in affirming the Commission's decision not to require unbundling of broadband facilities, determined that so long as the market can support (and in that instance was supporting) competition, it did not matter whether individual CLECs would be harmed absent UNE access: "[R]obust intermodal competition from cable providers – the existence of which is supported by very strong record evidence, including cable's maintenance of a broadband market share on the order of 60% – means that *even if all CLECs were driven from the broadband market, mass-market consumers will still have the benefits of competition between cable providers and ILECs*."[9] The D.C. Circuit's decisions thus leave no room for doubt that, in the face of evidence that consumers can obtain the benefits of competition without the social cost of unbundling, it is unlawful for the Commission to impose unbundling because some individual competitors may lack wholesale access to the facilities in question.

Third, the notion that there must be wholesale alternatives in a particular market before there can be a finding of no impairment fundamentally misconstrues the requirements of a lawful impairment inquiry. Section 251(d)(2) focuses on the "ability" of competitors to offer service with UNEs, and the D.C. Circuit has accordingly made plain that the relevant question under the statute is whether a facility is "[]suitable" for competitive supply or, put differently, whether there are "structural features" that, in a particular case, would make it "wasteful" for competitors to deploy their own facilities. [10]

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[6] Brief for the Respondents, *USTA v. FCC*, Nos. 00-1012, *et al.*, at 20 (D.C. Cir. filed Aug. 1, 2001).

[7] *USTA I,* 290 F.3d at 429.

[8] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied, NARUC v. United States Telecom Ass'n*, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

[9] *USTA II*, 359 F.3d at 582 (emphasis added; internal citation omitted).

[10] *USTA I*, 290 F.3d at 427.

A test based on whether competitors have chosen to act as wholesale providers in a particular market is not geared to answering that statutory question. The fact that some competitors have deployed facilities obviously demonstrates that the relevant market is suitable for competitive supply, regardless whether those competitors have chosen to act as wholesalers.

Indeed, that an efficient competitor is competing in analogous circumstances in *other* markets equally demonstrates that the market at issue is suitable for competitive supply, and thus requires a finding of non-impairment. As the D.C. Circuit explained in *USTA II*, the Commission cannot "simply ignore facilities deployment along similar routes when assessing impairment."[11] By focusing solely on the existence of wholesale competition in one market (or, even more egregiously, in one building) while blinding itself to evidence of competitive alternatives both in that market and in ones with like characteristics, the Commission would flout the D.C. Circuit's rulings.

Fourth, a decision by this Commission to base an impairment test on the existence of wholesale suppliers would be contrary to the reasoning in the Commission's own prior decisions. The Commission explained in the *Triennial Review Order* that it "disagreed" with claims that "evidence of alternative deployment is irrelevant unless access to those facilities is available to requesting carriers on a wholesale basis."[12] As the Commission explained, a test that focused on the wholesale market would fail to provide the correct incentives for CLECs to deploy their own facilities when they were able to do so, contrary to the core goals of the 1996 Act: "[W]e are concerned that [the wholesale market] approach] might discourage investment in facilities by competitors. As we have emphasized, ... one of the goals of the Act, impressed upon us by the courts, is investment in facilities by competitors."[13] The Commission also rejected a wholesale-based impairment test specifically because it "disregards the possibility of self-provisioning as an alternative to using the incumbent LEC's network, *contrary to the Supreme Court's direction.*"[14] That analysis is correct, and it too requires the Commission to reject misguided attempts to require a wholesale market as a precondition to granting unbundling relief.

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[11] *USTA II*, 359 F.3d at 575.

[12] *Triennial Review Order* ¶ 95.

[13] *Id.* ¶ 113.

[14] *Id.*

Sincerely,

Bennett L. Ross

BLR:kjw

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